



William V. O'Connor  
T: +1 858 550 6002  
woconnor@cooley.com

BY ELECTRONIC MAIL

May 9, 2022

Office of the Chief Counsel  
Attention: FAA Part 16 Docket Clerk, AGC-600  
Federal Aviation Administration  
800 Independence Ave. SW  
Washington, DC 20591  
[9-AWA-AGC-Part-16@faa.gov](mailto:9-AWA-AGC-Part-16@faa.gov)

**RE: *Doupe Services, LLC d/b/a Curtis Air Taxi and Jobs Lane Aviation, LLC v. Town of East Hampton, New York, FAA-2022-0542, Docket No. 16-22-05***

Pursuant to 14 C.F.R. § 16.26, the Town of East Hampton, New York (the “Town”) moves to dismiss and for summary judgment on all claims set forth in the complaint filed by Doupe Services LLC d/b/a Curtis Air Taxi and Jobs Lane Aviation, LLC (the “Complainants”) against the Town on April 18, 2022 (the “Complaint”)<sup>1</sup> because the Complainants: (1) failed to comply with mandatory pre-complaint resolution efforts under 14 C.F.R. § 16.21; (2) allege no cognizable injury and thus lack standing to file a complaint, see *id.* § 16.26(b)(1)(iii); and (3) allege no cognizable violation of law by the Town and therefore the Complaint does not warrant enforcement or other action by the FAA, *id.* § 16.26(b)(1)(ii).

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<sup>1</sup> Complainants moved to amend their Complaint on April 18, 2022. This motion should be denied because Complainants have not shown good cause as required under 14 C.F.R. § 16.23(j).



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As the FAA is well aware, the public-use East Hampton Airport (“HTO”) will no longer exist on May 17, 2022. At 9:00 a.m. on May 19, the private-use East Hampton Town Airport (“JPX”) will open. Despite the two airports sharing a common footprint, each is legally distinct and must be treated separate and apart from one another. That is precisely why every aspect of HTO that was publicly funded or sponsored (*e.g.*, navigational aids, FCC frequencies, instrument procedures, “shout lines” with TRACON (N90), flight validation for PAPIs, *etc.*) has been decommissioned or otherwise transferred to the Town for consideration, with the Town bearing responsibility for each and every cost associated with operating JPX going forward. The Complainants beg the FAA to ignore this basic yet dispositive fact when suggesting that former obligations of HTO apply to JPX.

The FAA need not reach the merits of this issue for several reasons discussed *infra*. But to the extent the FAA proceeds to adjudicate this matter, summary judgment should be granted in favor of the Town because there is no compliance issue here.

### **Summary and Background**

Far from running afoul of federal law, the Town has worked with the FAA to address the Town’s desire to obtain local control over the East Hampton Airport (“HTO”). Noise and environmental issues stemming from HTO have negatively impacted the Town and its residents for decades, and the efforts to solve these problems have stretched equally as long. That much is undisputed. Over the past two years, the Town—*in coordination with the FAA*—developed a plan pursuant to 14 C.F.R. § 157 to permanently close HTO



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on May 17, 2022, and open the new, private-use JPX on May 19, 2022. The FAA has approved the Town's plan when required, provided "no objection" letters of determination after completing airspace analyses regarding both the deactivation of HTO and activation of JPX, approved the Town's special procedures for JPX, published notice of the permanent closure of HTO in the *Federal Register*, and otherwise ensured that, when it opens, JPX will have all safety and operational capabilities that were available at HTO.

**A. HTO Outgrows the Town.**

The Town currently owns, sponsors, and operates HTO, which serves a mix of recreational aircraft and unscheduled or on-demand charter and air taxi operators who shuttle summer residents, weekend visitors, and tourists to and from New York City. Due to grant obligations imposed by federal funding that the Town accepted in September 2001, HTO is currently a "public-use" airport, such that the Town cannot control (i) who flies into or out of HTO; (ii) when these operators make use of HTO; or (iii) how loudly, noisily, or frequently they do so. The burden on the Town and its residents resulting from these operations has been intense—for example, during the summer season, HTO commonly experienced 400 or more takeoffs or landings in a single day, an overwhelming majority of which were commercial operations pursuant to Part 135; this amounts to approximately one operation every 90 seconds during daylight hours. (See Declaration of Supervisor Peter Van Scoyoc ("Supervisor Decl.") ¶ 9.)

Given the negative impact of operations to and from HTO on the health and quality of life of the East Hampton community, the Town's citizens demanded action, leading the



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Town to try various ways to mitigate or eliminate these negative impacts stemming from HTO. Some Town residents also took matters into their own hands by suing the FAA and the Department of Transportation in 2003 to limit the duration and extent of the Town's grant-assurance obligations, in order to allow HTO to be closed by a future Town Board. (See *id.* ¶ 10.) That litigation resulted in a 2005 settlement, under which the FAA agreed that certain grant assurances would not apply to HTO starting January 1, 2015. (See *id.* ¶ 11, Ex. 3; *id.* ¶ 12.) This 2005 settlement—along with guidance provided by the FAA to former U.S. Representative Timothy Bishop—was the genesis of the Town's 2015 local laws that were designed to implement reasonable limits on the use of HTO (the "Local Laws"). (See *id.* ¶ 11; *id.* ¶ 16, Ex. 5.)

Despite the 2005 Settlement, a small subset of aviation businesses sued the Town to challenge the Local Laws, and that litigation was resolved by the Second Circuit in *Friends of the East Hampton Airport, Inc. v. Town of East Hampton*, 841 F.3d 133 (2d Cir. 2016). While acknowledging HTO's various negative effects on the Town's residents and "express[ing] no view as to the wisdom of the local laws," *id.* at 137, 140, the Second Circuit held that the Airport Noise and Capacity Act of 1990 ("ANCA") applied to all public-use airports and therefore preempted the Local Laws. *Id.* at 140, 147.<sup>2</sup> Thus, so long as

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<sup>2</sup> The Second Circuit's reference to "public airports" is a reference to "public-use airports." This phrase can only be interpreted one way: any proprietor of a public-use airport. Under this commonsense interpretation, the Second Circuit's decision would mean that ANCA applies to an airport sponsor, regardless whether it is a public or private entity, if—but only if—the sponsor had accepted federal grant funds related to that airport. Pertinent here, this would mean that privately owned airports that had accepted federal funds, such



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HTO remained public-use—a status that it was required to maintain until September 26, 2021—the Town's ability to require prior permission to use HTO was limited under federal law. (Supervisor Decl. ¶ 24, Ex. 1.)

**B. After Seeking Guidance from the FAA and Commencing an Extensive Public Process, the Town Decides to Close HTO and Open JPX.**

Leading up to the September 26, 2021, grant-assurance expiration, the Town coordinated with state and federal regulators, retained several expert consultants, and engaged with the community—all in furtherance of a wide-ranging, ongoing, and transparent public process to decide the most suitable future for an airport in East Hampton, if any. Throughout the public process, the FAA has been an active, critical, and supportive partner to the Town, including by providing express guidance to the Town, including a November 6, 2020, letter (the “Letter”)<sup>3</sup> outlining the Town’s options when the grant assurances expired:

1. Negotiation of an agreement for mandatory restrictions on aircraft operators per ANCA as set forth in 14 C.F.R. §§ 161.1, *et seq.*;
2. Closure of the airport after the grant assurances expire (September 2021) and opening of a new, private-use airport;
3. Complete closure of the airport after the grant assurances expire (September 2021); or
4. Continue to operate the airport as a public-use airport.

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as Montauk Airport (MTP), are subject to ANCA. And publicly owned airports that did not accept federal funds, such as JPX, are not.

<sup>3</sup> David Fish, Director of the Eastern Region, Airports Division, signed the letter and copied multiple leadership and legal officials at the FAA, including Jennifer Solomon, Eastern Region Administrator; Maria Stanco, Eastern Region Deputy Administrator; Mary M. McCarthy, Regional Counsel, Eastern and New England Regions; and Jim Schultz, General Manager, NY District.



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(*Id.* ¶ 23, Ex. 1.)

Subsequently, extensive discussions between the FAA, expert consultants, and the community made clear to the Town Board that only the second option would accomplish the goals of, on the one hand, protecting the community and enhancing its quality of life and, on the other hand, preserving a local airport. (See, e.g., *id.* ¶¶ 25–38.) Specifically, this plan would permit the Town to exercise a measure of local control over its airport, provide the Town with the flexibility to address community concerns, and allow aviation stakeholders continued use of a safe and capable airport subject to reasonable limits. (*Id.* ¶ 49.)

Importantly, in the November 2020 Letter, the FAA confirmed that the closure-and-opening process (Option 2 in the Letter) would “extinguish[]” the Town’s statutory obligations (termed, “FAA obligations”)—noting that after closing HTO, “[t]he Town could also re-open as a . . . *private-use airport made available to others by the Town through authorized rights or by requiring prior permission.*” (*Id.* ¶ 24, Ex. 1 (emphasis added).) Thus, the Town, like any other proprietor of a private-use airport, could “requir[e] prior permission” to be obtained by operators before they could make use of a new, private-use airport—also known as a “PPR” or “Prior Permission Required” framework—and set limits on the type and frequency of certain airport operations. (*Id.*)

Relying on the FAA’s guidance, the Town accelerated its efforts to address the problems caused by HTO and initiated a formal public process to determine the



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community's preference for the airport moving forward. The Town invited feedback from East Hampton residents, other surrounding communities, and aviation stakeholders; remained in close contact with the FAA and NYSDOT to ensure compliance with all state and federal obligations; coordinated decision making in compliance with New York's environmental laws; and commissioned reports from expert consultants on potential environmental, economic, zoning, and noise effects of modifying operations at HTO to fully inform the Town's decision-making process. (*Id.* ¶¶ 25–40.) Notably, neither of the Complainants participated in that process. (*Id.* ¶ 35.)

The Town also engaged two consultants to help manage an extensive and detailed community engagement process. (See *id.* ¶¶ 34–36, 57.) From this diversity of views, patterns of consensus emerged. For instance, during the several Town-hosted public workshops, approximately 80% of participants stated that continuing to operate HTO as a public-use airport was “unacceptable” and “changes to airport operations were needed,” whereas only 5% of participants were comfortable keeping HTO as is. (*Id.* ¶ 36, Ex. 8.) Similarly, feedback received during the community engagement sessions showed that the overwhelming majority of community members and airport users would not tolerate keeping HTO as it had been historically used, but also felt a modified airport with fewer operations and more local control would be preferable to altogether losing access to an airport in East Hampton. (See, e.g., *id.* ¶¶ 4, 21–25, 34–37.)

Thus, the Town Board had its mandate: pursue the closure-and-opening process recommended by the FAA to sensibly regulate a new, private-use airport to balance



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community needs with the interests of airport users. (*Id.* ¶ 37.) And if that balancing act proved impossible, the community’s near-unanimous agreement was that keeping HTO as-is would be intolerable and accordingly the Town would need to altogether forego sponsoring an airport in East Hampton. (*Id.* ¶ 37.)

**C. Working with the FAA, the Town Developed a Detailed Plan to Deactivate HTO and Open JPX.**

To execute this plan, the Town continued to work with the FAA. Specifically, on January 20, 2022, after months spent discussing the best path forward with the FAA and in reliance on the November 2020 Letter, the Town filed two Form 7480-1s with the FAA, which notified the FAA that the Town planned to deactivate HTO on February 28, 2022, and activate a new, private-use airport on March 4, 2022. (*Id.* ¶ 39, Exs. 24–25.) After further discussions with the FAA regarding the significant work required to complete the deactivation and activation processes, on February 16, 2022, the FAA suggested that the Town postpone the deactivation of HTO from February until May. The Town agreed. (*Id.* ¶ 42, Ex. 27.) That postponement would coincide with FAA charting cycles and allow the Town and FAA to complete several critical tasks to accomplish the deactivation of HTO and activation of the new, private-use airport in the least disruptive way possible. *All those critical tasks have now been completed.*

In March 2022, the FAA issued a “no objection” letter greenlighting the Town’s deactivation of HTO at 11:59 p.m. on May 17, 2022, and activation of the new, private-use airport at 9:00 a.m. on May 19, 2022. (*Id.* ¶ 46, Exs. 30–32; *id.* ¶ 45, Ex. 29.) The



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FAA also issued a LocID to the new airport, “JPX.” (*Id.* ¶ 46, Ex. 32.) Over the next few weeks, all the navigational, communication, and weather aids were confirmed to be available at JPX upon opening on May 19. Then, on April 22, 2022, the FAA confirmed that the Town’s special use instrument procedures were approved, in turn confirming that every safety and operational capability available at HTO will be available upon opening of JPX. (See *id.* ¶ 47.)

The Complainants dismiss the closing of HTO and opening of JPX as a “sleight-of-hand maneuver” that is “audacious, “cunning,” and “transparent gamesmanship.” (Compl. at 1, 6, 11.) But as the FAA well knows, that assertion ignores critical facts, as well as the substance and extent of the significant coordination required to deactivate HTO and, separately, activate JPX as a private-use airport. The collaboration between the FAA and Town to permanently close HTO and open JPX has been extensive, wide-reaching, and compliant with every applicable statute or regulation.

**1. JPX relies on different systems and is separate and distinct from HTO.**

The Town has worked with the FAA through a lengthy, collaborative process to check off every mandatory item necessary to deactivate HTO and activate JPX. This involved decommissioning several aeronautical services currently in operation at HTO, such as HTO’s communication, navigational, and weather aids; its privately funded air traffic control tower pursuant to Form 7900.2D; its publicly funded and maintained instrument flight procedures; and letters of agreement for HTO between the Town and



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the FAA (e.g., TRACON (N90)). (Supervisor Decl. ¶ 45, Ex. 29.) Concurrently, the Town worked closely with the FAA to obtain approval to activate JPX, which will be “new” in every sense of the word. To give just a few examples, JPX has a new name (East Hampton Town Airport), a new LocID (JPX), and it will *not* be part of the National Plan of Integrated Airports. It also will be newly designated on FAA charts and has its own private special procedures; reimbursable agreements with the FAA to pay for services that were previously federally funded; a re-designated FCC frequency allocation; a newly commissioned private air traffic control tower; letters of agreement with TRACON (N90) for coordination with the JPX tower; and self-funded navigation aid flight validations. (*Id.* ¶ 45.)

The processes undertaken to secure these results were not simple and cannot be glossed over as a legal fiction. Rather, they were undertaken to ensure that as of May 17, HTO will be retired and that come May 19, the Town will open a new, private-use airport. The Town has expended considerable time and resources trying to achieve a balance between the community’s needs and aviation stakeholders’ desires in full reliance on the FAA’s November 2020 Letter. Those efforts and the Town’s resulting actions, in turn, have been supported by the FAA and its staff. In the end, JPX is not and will not be the same as HTO and cannot be treated as such. Period. Accordingly, any obligations that once attached to HTO do not apply to JPX.



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**2. JPX's 2022 Season PPR Rules treat all aircraft operators equally.**

The Town recently enacted the trial PPR rules that will govern during the 2022 summer season ("2022 Season") as required by the Town's environmental review process under SEQRA. (See *id.* ¶ 51, Ex. 33.)<sup>4</sup> The Town's 2022 summer season trial PPR largely grants operators blanket permission to operate subject to reasonable limitations (*i.e.*, a curfew, a daily roundtrip limit for "noisy" aircraft, *etc.*), reflecting an effort by the Town to balance the community's concerns while keeping an airport open for use in East Hampton. (*Id.*)

Contrary to the Complainants' suggestions, those rules do not ban any operator who has previously used HTO. (*Id.*) Pertinent here, the trial PPR rules certainly do not ban Complainants. Doupe Services alleges that it operates a Cessna 150 and a Cessna 172 under Part 91 and a Beech Baron under Part 135. Jobs Lane Aviation alleges that it operates a Cessna C525 under Part 91. (See Compl. at 5.) The Cessna 150 and 172 can use JPX subject only to a reasonable curfew, and the Baron and C525 are subject to the curfew plus a one-roundtrip-per-day limit. There is no allegation that either operator will be meaningfully impacted—if impacted at all—under the trial PPR rules. Moreover, the Complainants cite no evidence that these rules will operate to bar any operator from using JPX—because there is none. And to be sure, the absence of such an allegation is

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<sup>4</sup> These trial rules were approved on May 5, 2022, and do not prohibit any operator from using JPX. See *Rules and Regulations for E. Hampton Town Airport* (effective May 19, 2022), <https://ehamptonny.gov/DocumentCenter/View/12711/TOEH---Airport-Rules-and-Regulations1-final>.



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not an oversight. Instead, it is recognition that the Town's efforts to balance community needs with sponsoring a local airport are more than reasonable and allow all operators to make use of JPX.

### **Argument**

The FAA need not reach the substantive question regarding whether statutory obligations apply to JPX. Indeed, there are multiple, independent grounds for the FAA to dismiss the Complaint short of the merits, including (1) a procedural defect related to the Complainants' failure to satisfy the mandatory pre-complaint resolution process, and (2) a standing defect arising from the Complainants' failure to allege any harm. Looking to the merits themselves, the Complainants fail to allege a cognizable compliance issue against the Town to warrant enforcement. For each reason, the FAA should dismiss the Complaint.<sup>5</sup>

### **Failure to Comply with Pre-Complaint Resolution Efforts**

The Complainants have failed to comply with mandatory pre-complaint resolution efforts before filing their Complaint as it relates to allegations regarding HTO. The FAA has set forth a detailed procedural regime governing "all . . . proceedings involving Federally-assisted airports," including actions initiated via administrative complaint. See 14 C.F.R. § 16.1, *et seq.* These rules require the Complainants to "initiate and engage in

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<sup>5</sup> If the FAA chooses not to dismiss the Complaint on procedural grounds and proceeds to consider the Complaint on its merits, there is no exigency to require "expedited action" under 14 C.F.R. § 16.11(b), as the Complainants request. (Compl. at 1.)



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. . . substantial and reasonable good faith efforts to resolve the disputed matter informally prior to filing [a] complaint.” *Id.* § 16.21(a)–(b) (emphasis added). Adherence to this procedure must be certified in the complaint and “demonstrated by pertinent documentation.” *Id.* § 16.21(c). Importantly, non-compliant complaints must be dismissed. *Id.* § 16.27 (stating “the Director *will* dismiss” complaints that are “deficient as to one or more of the requirements set forth in [14 C.F.R.] § 16.21” (emphasis added)).

The Complainants acknowledge that they are ignoring this basic, pre-filing requirement, citing “the circumstances of this case.” (Compl. at 10.) The Complainants argue procedural compliance would be futile given the Town’s “clear” position regarding the future of the airport. *Id.* But the FAA’s administrative scheme is not subject to a futility standard, as demonstrated by the “mandatory” language of the regulation and the FAA’s strict enforcement of § 16.21. See, e.g., *Mark Shinnick v. Mojave Air & Space Port*, FAA Docket No. 16-19-13, 2019 WL 10272368, at \*1 (Oct. 22, 2019) (“The FAA’s requirement for documented efforts to resolve this specific matter are *mandatory* and *must* be accomplished . . . .” (emphases added)).<sup>6</sup>

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<sup>6</sup> *Accord Haynes Ceo Dehas Ltd. d/b/a Blue Ridge Nebula Starlines v. Adams Cnty.*, FAA Docket No. 16-22-03, 2022 WL 1039795, at \*1 (Mar. 28, 2022) (“Complaints filed under Part 16 will not be considered unless the person or authorized representative filing the complaint certifies that substantial and reasonable good faith efforts to resolve the disputed matter informally prior to filing the complaint have been made and that there appears no reasonable prospect for timely resolution of the dispute.”); *Above All Aviation v. City of Santa Barbara*, FAA Docket No. 16-22-02, 2022 WL 1039793, at \*1 (Mar. 23, 2022) (“Prior to filing a Part 16 complaint, a person directly and substantially affected by the alleged noncompliance must engage in good faith efforts to resolve the disputed matter informally with those individuals or entities believed responsible for the



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Counterintuitively, the two FAA determinations cited by the Complainants support dismissal of the Complaint. The complainants in *NBAA v. Santa Monica*, for example, sent numerous letters to the respondent offering to mediate the parties' dispute *before* filing suit. See FAA Docket No. 16-14-04, 2015 WL 13603433, at \*10 (Dec. 4, 2015). The complainants in *Bombardier Aerospace Corp. v. Santa Monica* similarly communicated with the respondent via telephone and letter *before* filing suit, and further certified and documented their efforts as required under § 16.21. See FAA Docket No. 16-03-11, 2004 WL 3198208, at \*17–19 (Jan. 3, 2004). By contrast, the Complainants in this case have made *no* effort to negotiate with the Town in good faith (let alone engage in the extensive public processes over the past two years), nor have they certified

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noncompliance.”); *Bondio, LLC & Joseph Mirakhor v. Palm Beach Cnty. Dep’t of Airports*, FAA Docket No. 16-21-18, 2022 WL 193646, at \*1 (Jan. 13, 2022) (recognizing that a complainant “shall include a brief description of the party’s efforts to obtain informal resolution” and that “[s]uch efforts to resolve informally should be relatively recent and be demonstrated by pertinent documentation”); *Thomas Vanduin v. Alpena Cnty. Airport*, FAA Docket No. 16-21-05, 2021 WL 4727447, at \*1 (Sept. 24, 2021) (“Mr. Duinen has not adequately identified his efforts at informal resolution. He states he has complained several times to the Airport District Office in Detroit ‘and in Washington for many years to no avail.’ He also says he has tried to resolve the issue several times with the County and they refuse to discuss. No details or documents are provided. These vague statements, unsupported by documentation, do not satisfy the requirements of [§ 16.21].”); *Kunz v. Salt Lake City Dep’t of Airports*, FAA Docket No. 16-19-11, 2019 WL 10272366, at \*1 (Oct. 4, 2019) (“Complaints filed under Part 16 will not be considered unless the complaint certifies that substantial and reasonable good faith efforts to resolve the disputed matter informally prior to filing the complaint have been made, and that there appears no reasonable prospect for timely resolution of the dispute. This certification must include a brief description of the efforts to obtain informal resolution per 14 CFR § 16.21(c).”).



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compliance with § 16.21 or provided the requisite documentation. Indeed, the Complainants admit non-compliance. For this reason alone, dismissal is appropriate.

Moreover, even if “futility” was an appropriate basis for Complainants to ignore mandatory regulations, such a standard would not apply here. The Town has engaged the public throughout the closure-and-opening process, to date having received over 1,500 formal comments. And the Town thoroughly reviewed and considered each comment, as demonstrated by changes to the proposed PPR rules and landing fees. For example, the noise-based restriction was amended to presumptively *not* apply to piston-driven fixed-wing aircraft (such as Cessna 150s, Cessna 172s, and Beech Barons); certain activities are now authorized to occur within the discretion of the Airport Director, such as touch-and-goes; and the landing-fee weight limits have been amended. This non-exhaustive list is only meant to show that Complainants’ “futility” argument is baseless and should be rejected (even if the FAA otherwise believes that futility is a valid reason to allow Complainants to ignore mandatory regulations).

For this reason alone, the Complaint should be dismissed.

#### The Complainants Allege No Harm

The Complainants also fail to allege adequate harm for standing to bring their Complaint, as they do not meet the requisite standard of being a party that is “directly and substantially affected by any alleged noncompliance.” 14 C.F.R. § 16.23(a).

The Complainants only offer conclusory assertions that they “are immediately, directly and substantially affected” by the Town’s closing of HTO and opening of JPX—



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without identifying *any* specific harm. (See Compl. at 5–6.) At best, the Complainants only vaguely reference that this process will allow the Town to “impose operational restrictions at [JPX] and divert funds from HTO accounts to municipal accounts.” *Id.* But no actual revenue diversion has been alleged, nor is there reason to believe—and no allegations have been made—that the Town’s trial PPR rules for the 2022 Season (part of the Town’s SEQRA review process) will affect the Complainants at all. See *Rules and Regulations for E. Hampton Town Airport* (effective May 19, 2022), <https://ehamptonny.gov/DocumentCenter/View/12711/TOEH---Airport-Rules-and-Regulations1-final>. As explained *supra*, the Complainants will be permitted to operate out of JPX, like the rest of the other aeronautical users of JPX being afforded permissions, subject to reasonable restrictions.

The Complainants’ inability to proffer any allegations that they will be directly and substantially affected by the Town’s process means that they are unable to demonstrate standing as required under 14 C.F.R. § 16.23. Accordingly, dismissal is appropriate.

No Applicability or Violation of Exclusive-Rights and Revenue-Diversion Laws

If the FAA does not dismiss the Complaint on the above grounds, and proceeds to consider the Complaint on its merits, the FAA should grant summary judgment because the Town’s opening and operation of JPX involves no violation of law.<sup>7</sup> The Complaint

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<sup>7</sup> There is no dispute that the Town’s grant assurances expired in September 2021, as explicitly reflected in the federal register notice. 87 Fed. Reg. 22617 (Apr. 15, 2022). The Complaint is based wholly on alleged violations of statutory obligations.



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alleges that the Town's opening of JPX, a private-use airport, will violate statutory obligations under 49 U.S.C. § 40103(e) and 49 U.S.C. § 47133(a). Complainants fail to allege a viable cause of action as neither statute applies to JPX.

There is a simple, dispositive reason why the Town's operation of JPX will not violate any statutory obligations: JPX will not be and has never been the recipient of federal funds. Indeed, based on substantial efforts by the Town to work and coordinate with various stakeholders, including the FAA, the private-use JPX will be legally distinct from the public-use HTO. Indeed, the Town's efforts to close HTO and activate JPX were a result of the FAA's guidance in the November 2020 Letter—which itself confirmed that (i) closing HTO would extinguish the “Exclusive Rights” and “Revenue Use” obligations and (ii) operating a private-use airport would allow the Town to rely on a prior permission required framework. (Supervisor Decl. ¶ 24, Ex. 1.) In the following year and a half, the FAA accepted that plan and offered “no objection” to it. (See, e.g., Compl. Ex. 13, at 1 (acknowledging plan for “closing of [HTO]” and “activating the private-use airport”); *id.* Ex. 17, at 1 (finding “no objection” to the plan for a “new, private-use airport”).)<sup>8</sup> Now, on the

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<sup>8</sup> The Complaint relies extensively on the FAA's February 2, 2022, letter to the Town (Compl. Ex. 13) regarding the January 25, 2022, meeting and the FAA's list of actions and issues triggered by the Town's submission of Form 7480—Deactivation of an Airport (Aeronautical Study Number (ASN) 2022-AEA-313-NRA), and Form 7480—Activation of an Airport (ANS 2022-AEA-415-NRA). That letter, however, does not support the alleged noncompliance by the Town. To the contrary, it demonstrates the coordination required to open JPX. The FAA expressed concerns regarding the Town's initial timeline. The Town listened to those concerns by extending the timeline to May 2022. And true to its word, the FAA facilitated the resolution of all outstanding issues raised in the February 2, 2022, letter within the extended timeframe.



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eve of the Town's deactivation of HTO and opening of JPX, the Complainants seek to undo years of work by the Town by asking the FAA to walk back its November 2020 guidance as "in fact, erroneous." (Compl. at 6.)

The Complaint is based entirely on the errant premise that JPX is the "exact same facility" or "airport" as the deactivated HTO, even though HTO will permanently close on May 17, 2022. To support their argument, the Complainants misquote and misunderstand FAA Order 5190.6B, which itself explicitly says it is "*not regulatory and is not controlling* with regard to airport sponsor conduct," and that it is meant to "address[] the application of [certain] assurances in the operation of *public-use airports*." Order 5190.6B, p. 1-1 (emphases added). Indeed, by its own terms, Order 5190.6B does not apply to JPX as a private-use airport. *Id.* But even if it did, Order 5190.6B does not actually provide support for the Complainants' request that the FAA backtrack on the November 2020 Letter and subsequent actions that the Town took in reliance on that letter and other interactions with the FAA when pursuing this multi-year process to balance community needs with aviation stakeholder desires.<sup>9</sup>

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<sup>9</sup> Other authorities cited by the Complainants likewise are not relevant to the issue at hand, *i.e.*, whether the operation of JPX under a PPR framework violates any exclusive-rights or revenue-diversion obligations of HTO, a soon-to-be-closed and entirely distinct airport. See, e.g., *Use of Airports*, 40 U.S. Op. Atty. Gen. 71 (June 4, 1941), *available at* 1941 WL 1882 (opining on whether an "exclusive right to use an airport for a particular aeronautical activity" is an impermissible exclusive right, while noting that the purpose of this provision is to prohibit monopolies and encourage competition); *Exclusive Rights at Airports*, 30 Fed. Reg. 13361 (Oct. 27, 1965) (vaguely stating the purpose to establish FAA policy "on the conduct of aeronautical activities *at public airports on which Federal funds, administered by the Agency, have been expended*" (emphasis added)); *Air*



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*First*, as to exclusive-rights obligations, Order 5190.6B says that “[o]nce federal funds have been expended *at an airport*, . . . the exclusive rights prohibition is applicable to *that airport* . . . in perpetuity.” Order 5190.6B, p. 8-4 (emphases added). True, the statutory obligations apply to *HTO* in perpetuity as “that airport” received federal funds. But, as explained, *HTO* is permanently deactivating on May 17, 2022, and thus all obligations, including statutory obligations, will have run their course at that time. *JPX*, on the other hand, will not receive federal funds and thus the exclusive-rights prohibition is *not* “applicable to that airport in perpetuity.” *Id.*, p. 8-4 to 8-5.<sup>10</sup>

*Second*, as to revenue-diversion obligations, Order 5190.6B says that these obligations only “[a]ppl[y] to airports subject” to “[a]ny federal agreement” and only “as long as the facility is used as a public-use airport.” Order 5190.6B, p. 2-15. *JPX* is not and will not be subject to any federal agreement that triggers these obligations, and the facility will not be used as a public-use airport. Accordingly, the revenue-diversion

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*Transport Ass’n of Am., Inc. d/b/a Airlines for Am. v. Port of Portland*, FAA Docket No. 16-16-04, 2017 WL 11548938, at \*9 (Aug. 17, 2017) (initial, case-specific determination that did not address extinguishing public-use obligations through airport closure); *In the Matter of Compliance with Fed. Obligations by the City Of Santa Monica*, FAA Docket No. 16-02-08, 2008 WL 6895776, at \*12 n.3 (May 27, 2008) (same); *Dart v. City of Corona*, FAA Docket No. 16-99-20, 2000 WL 1092312, at 8 (June 26, 2000) (same).

<sup>10</sup> Even if the exclusive-rights prohibition were applicable, the Complaint fails to show that any improper exclusive-right violation has occurred. This is unsurprising given that all operators are permitted to use the airport subject to reasonable and non-discriminatory rules that apply equally to all operators.



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prohibition, like the exclusive-rights prohibition, does not apply at all. *Id.* By the express terms of Order 5190.6B, then, the Complainants' allegations fall flat.<sup>11</sup>

All that is to say, the FAA's guidance in the November 2020 Letter—on which the Town has substantially relied—properly interpreted the law to find that HTO's closure would extinguish any exclusive-rights or revenue-diversion obligations. Since receiving the November 2020 Letter, the Town has spent considerable resources and time in good faith reliance on the FAA's interpretation of its own statutes and regulations. Not once has the FAA stated that the November 2020 Letter was incorrect or otherwise instructed the Town that its substantial reliance on the November 2020 letter was misplaced. And for good reason: the FAA was correct when it provided this guidance to the Town in November 2020, and it was correct in the following 18 months when working alongside the Town to execute on the closure-and-opening plan.

Moreover, as reflected by the FAA's own internal guidance, the FAA should “maintain a balance between the needs of aviation and the requirements of residents in neighboring areas.” Order 5190.6B, p. 1-4. The FAA properly struck that balance in issuing its November 2020 guidance and suggesting that the Town deactivate HTO and activate JPX as a private-use airport under a PPR framework. Were the FAA to backtrack and find that the plan, in fact, cannot proceed, the Town will be forced to close HTO and

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<sup>11</sup> The Complaint does not actually allege that the Town is diverting funds of HTO or will divert funds of JPX. That defect negates any basis for finding a violation or awarding the relief sought.



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opt not to open a new airport in East Hampton, as the continued operation of a public-use airport is incompatible with the community around it and not supported by upwards of 90% of community residents. These policy interests further support finding that the FAA's stated position in the November 2020 Letter was correct.

For the above reasons, the statutory prohibitions on exclusive rights and revenue diversion do not apply to JPX. Because there is no violation of law, the FAA can and should dismiss the Complaint or grant the Town summary judgment on all counts.

### **Conclusion**

At its core, the Complaint is a misguided attempt to supplant years of deliberation by the Town and its citizens, all of which occurred in close coordination with the FAA. What the Complaint cynically dismisses as mere "gamesmanship" involved, in fact, significant expenditure of time and resources to safely and efficiently deactivate HTO and activate JPX to ensure that the Town could balance local interests in imposing reasonable restrictions on airport activities with national interests in maintaining a capable airport in East Hampton—whether under a PPR framework or otherwise. For all the above reasons, the FAA should dismiss the Complaint or grant the Town summary judgment on all counts.



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Respectfully submitted,

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William O'Connor, Esq.  
Cooley LLP  
4401 Eastgate Mall  
San Diego, CA 92121  
(858) 550-6002  
[woconnor@cooley.com](mailto:woconnor@cooley.com)

cc: Andrew Barr, Esq.  
Cooley LLP  
1144 15th Street, Suite 2300  
Denver, CO 80202  
(720) 566-4121  
[abarr@cooley.com](mailto:abarr@cooley.com)

Robert Jacques, Esq.  
Cooley LLP  
1299 Pennsylvania Avenue, Suite 700  
Washington, DC 20004  
(202) 776-2063  
[rjacques@cooley.com](mailto:rjacques@cooley.com)

Jol A. Silversmith, Esq.  
Barbara M. Marrin, Esq.  
KMA Zuckert LLC  
888 17th Street NW, Suite 700  
Washington, DC 20006  
(202) 298-8660  
[jsilversmith@kmazuckert.com](mailto:jsilversmith@kmazuckert.com)  
[bmarrin@kmazuckert.com](mailto:bmarrin@kmazuckert.com)



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**Certificate of Service**

I hereby certify that I have this day caused the foregoing document to be served on the following persons at the following address by electronic mail:

Jol A. Silversmith, Esq.  
Barbara M. Marrin, Esq.  
KMA Zuckert LLC  
888 17th Street NW, Suite 700  
Washington, DC 20006  
(202) 298-8660  
[jsilversmith@kmazuckert.com](mailto:jsilversmith@kmazuckert.com)  
[bmarrin@kmazuckert.com](mailto:bmarrin@kmazuckert.com)

A handwritten signature in blue ink, reading "Erin Combs", is positioned above a horizontal line.

Erin Combs

Dated: May 9, 2022